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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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December 27, 2006

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The Solicitor General agrees with petitioners that the Eighth Circuit's legal standard for federal officer removal is fundamentally flawed and that the court's application of its erroneous standard to the facts of this case is "clearly incorrect." SG Br. 8. The Solicitor General nevertheless recommends against certiorari because, in his view, the Eighth Circuit's unsound interpretation of 28 U.S.C. § 1442(a) does not squarely conflict with the legal standard adopted by any other circuit and because a single judge's separate concurring opinion below makes it more difficult to assess the full extent of the decision's adverse practical implications.

The Solicitor General's reservations should not deter the Court from granting plenary review. First, the Solicitor General acknowledges that the First, Seventh, and Eleventh Circuits have applied standards for federal officer removal that are markedly different from – and more demanding than – the Eighth Circuit's "comprehensive control" test. That those courts articulated their standards in cases *upholding* rather than *rejecting* removal on the facts before them does not diminish the clear circuit split. If this case had arisen in any of those other circuits, the outcome would almost certainly have been different.

Second, there is little to be gained and much to be lost by denying review pending further development of the law in the lower courts. The existing disarray in the courts of appeals and among the district courts on this recurring legal issue is already both mature and pervasive, and this Court's guidance is urgently needed to ensure uniform administration of the federal officer removal statute. The Solicitor General's preference for deferring review until the existing splits harden even further would impose needless continuing litigation burdens on private parties and on federal district courts and would significantly impair the ability of the States to enforce consumer-protection laws in state courts.

A. The Solicitor General Agrees That The Eighth Circuit's Legal Test Is Flawed And That Philip Morris Is Not Entitled To Removal

1. Petitioners argue that the Eighth Circuit's expansive interpretation of 28 U.S.C. § 1442(a)(1) – which authorizes removal by a "person acting under [a federal] officer" – is inconsistent with the text, history, and purpose of the provision, and that "[a] private regulated corporation doing no more than abiding by federal regulation cannot avail itself of the protection of the federal officer removal statute." Pet. 25.

The Solicitor General reaches precisely the same conclusion: in his view, "a private party's mere compliance with federal regulatory requirements, no matter how pervasive, does not make removal appropriate under the federal officer provision." SG Br. 18. "Pervasive regulation," the Solicitor General explains, "may give rise to a preemption *defense*, but absent the rare circumstances of complete preemption, that is no basis for removal." *Id.*; *see* Pet. 24-25. Rather, removal is appropriate when a private party "act[s] on behalf of a federal officer or otherwise assist[s] a federal officer in carrying out that officer's duties." SG Br. 18. That standard "would not . . . remotely encompass tobacco manufacturers," such as Philip Morris, "that market 'light' cigarettes, because in so doing the tobacco companies are not acting on behalf of federal officers or otherwise assisting federal officers in carrying out their duties." *Id.* at 18-19.

2. The Solicitor General's proposed test is consistent with our understanding (*see* Pet. 19-20) of *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). In construing the civil rights removal provision of § 1443(2), which authorizes removal "[f]or any act under color of authority derived from any law providing for equal rights," the Court determined, by analogy to the predecessor of § 1442(a)(1), that private parties may remove an action only when they assist or act with or for federal officials in "affirmatively executing duties under . . . federal law." *Id.* at 824.

The Solicitor General may well be correct that the current version of § 1442(a)(1) authorizes removal by private parties assisting federal officers in performing any duty, not just those connected to law enforcement. *See* SG Br. 17-18. But that means only that the government's proposed test is slightly broader than the factual circumstances in *Peacock*. The key feature of the Solicitor General's suggested test is that a private party may be "acting under" a federal officer only when it "act[s] on behalf of, or otherwise assist[s], [a] federal officer." *Id.* at 18. That formulation is entirely consistent with what *Peacock* said about the history of the federal officer removal statute.[1] It is likewise consistent with our own view of the governing standard.[2]

B. The Solicitor General Underestimates The Conflict Among And Disarray In The Federal Courts

Although agreeing that the Eighth Circuit's legal standard is "flawed" (at 18) and that the court of appeals "seriously erred" in applying even its own (incorrect) legal standard to the "historical record" (at 8), the Solicitor General recommends against this Court's review in part because "there is no present conflict in the circuits on the proper legal standard for determining when a private party is acting under a federal officer" (at 19-20). That appraisal, however, is unduly formalistic.

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[1] *See Peacock*, 384 U.S. at 820 n.17, 823 n.20 (noting that Customs Act of 1815 protected private parties who "aid[ed] or assist[ed]" the revenue officer and describing the lineage between the "acting under" clause of the federal revenue officer statute, which became the general federal officer removal statute, and the "other person" provision of the Customs Act).

[2] Although the petition (at 20) characterizes *Peacock* as establishing that removal by a private party is appropriate only when that party assists a federal officer in enforcing federal law, that characterization was descriptive, not prescriptive – the duties at issue in *Peacock* were enforcement-related. The Solicitor General's proposal of a broader standard that would encompass duties other than law enforcement hardly supports the conclusion that petitioners and the Solicitor General advocate a different legal test. *See* SG Br. 20.

Three circuits – the First, Seventh, and Eleventh – have applied the federal officer removal statute in a manner fundamentally different from that of the Eighth Circuit. *See* Pet. 9-17; Reply 1-5. The Solicitor General does not dispute that those circuits apply a more stringent legal standard. *See* SG Br. 12-13. In his view, however, the decisions say only that "carrying out an official government function is a *sufficient* basis for removal," not that it is "a *necessary* condition" for removal. *Id.* at 14. True, those decisions uphold rather than reject removal and therefore do not technically exclude the Eighth Circuit's "comprehensive control" test. But any notion that the decisions can be aligned with the Eighth Circuit's holding below is dispelled once one looks past that thin formality.

The key point is that the First, Seventh, and Eleventh Circuits began and ended their analysis of the "acting under" clause with whether the removing party engaged in or assisted a federal officer in performing official governmental functions. The First Circuit explained that a private party may seek removal under § 1442(a)(1) when it acts "strictly and solely at federal behest" in carrying out "official government business." *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989). The Seventh Circuit held that a private party was entitled to removal because he was "participating in a federal investigation and acted under the instructions of federal agents." *Venezia v. Robinson*, 16 F.3d 209, 211 (7th Cir. 1994).[3] And the Eleventh Circuit held that removal was proper because the defendant was "an authorized agent of the FAA" to whom the FAA had "delegate[d]" "powers and duties" of the government. *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1428 (11th Cir. 1996).

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[3] Lower federal courts have read *Venezia* as endorsing an official-function test. *See, e.g., Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 846 (S.D. Ill. 2006) (under *Venezia*, "to establish federal officer jurisdiction, a removing defendant must show that it effectively stands in the shoes of a federal employee").

In the Eighth Circuit, by contrast, it is irrelevant whether a removing party is acting for or otherwise assisting a federal officer in carrying out an official duty. Removal instead depends solely on "the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a.

Those different legal frameworks will predictably yield conflicting outcomes, for there are many circumstances – this case is just one example – in which a party is subject to comprehensive control through federal regulation but is not assisting a federal officer in carrying out an official duty. That the First, Seventh, and Eleventh Circuits have not yet had occasion to apply their more rigorous standards to *deny* removal is not surprising: at least until the Eighth Circuit's decision muddied the waters, the district courts and the litigants in those circuits had understood that, under the prevailing precedent, a private party could not remove a case on the theory that its actions were subject to federal regulatory control.

The divide among the federal district courts – an issue that the Solicitor General altogether overlooks – exacerbates the problem. As the petition establishes (at 12-13), those courts themselves sharply disagree on whether, to invoke § 1442(a)(1), a private party must show that its conduct is of an official or quasi-official character.[4] Even

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[4] *Compare Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002) ("[P]rivate actors seeking to benefit from [§ 1442(a)(1)] bear a special burden of establishing the official nature of their activities."); *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530 (W.D. Ky. 1996); *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (removal is permitted "only when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government"); *Kaplansky v. Associated YM-YWHA's of Greater New York, Inc.*, No. 88 CV 1292, 1989 WL 29938, at *3 (E.D.N.Y. Mar. 27, 1989) (parties complying with subpoena were not "acting under" federal officer because defendants were not "asked to stand in the shoes of [federal] officers or agents and perform 'official' functions"); *New Jersey Dep't of Envtl. Protection v. Viacom, Inc.*, No. Civ. A. 06-1753, 2006 WL

among district courts that apply a regulatory control test, substantial confusion exists over the necessary level of control. *See* Pet. 15 n.8.

Although a division among the courts of appeals normally signals most plainly the need for this Court's intervention, federal *district* courts functionally have the final word on the meaning of § 1442(a)(1) because an "order remanding a case to the State court from which it was removed is not reviewable on appeal." 28 U.S.C. § 1447(d). Nor is an order denying a remand motion immediately appealable except on certification.[5]

Whether a private party can successfully remove a state action based on a "comprehensive control" theory thus depends almost entirely on the federal district court to which the case is removed. This Court should grant review to bring uniformity to these divergent outcomes and to resolve an important question that has confounded – and will continue to confound – the lower federal courts.

3534364, at *2 (D.N.J. Dec. 7, 2006) ("When actual federal officers are seeking removal, the right of removal is liberally construed. However, a private party seeking removal bears a special burden of establishing the official nature of its activities.") (internal citations, alterations, and quotation marks omitted), *with, e.g., In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 562-63 (D. Md. 2004) (applying "direct and detailed" federal control test); *In re 'Agent Orange' Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004) ("acting under" clause is satisfied by showing "substantial degree of direct and detailed federal control"); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) ("direct and detailed control" alone supports removal).

[5] *See, e.g., Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1064-65 (5th Cir. 1981) ("An order denying remand of a case removed to federal court is not a final order within the meaning of 28 U.S.C. § 1291 and, standing by itself, it cannot be appealed unless certified by the district court according to the provisions of 28 U.S.C. § 1292(b).") (footnote omitted); *Neal v. Brown*, 980 F.2d 747, 748 (D.C. Cir. 1992) (per curiam) (collecting cases).

C. The Wait-And-See Approach Advocated By The Solicitor General Is Unwarranted

The Solicitor General believes it is too early to assess the practical importance of the Eighth Circuit's ruling. Because the court determined that the FTC regulated the tobacco industry to "'an unprecedented extent'" and because the concurring judge below emphasized that "the FTC's direction and control over respondent's activities was 'extraordinary,'" "the extent to which other regulated industries may be able to take advantage of the decision below is, at this point, entirely unclear." SG Br. 16 (quoting Pet. App. 13a, 18a). The Solicitor General concludes that review is "premature" (at 16) and that the issue should be allowed to "ventilate[] in the lower courts" (at 20).

Postponing review, however, is unlikely to advance the state of the law and may have substantial negative effects. *First*, this is not a case in which a narrow, or slightly different, reading of the Eighth Circuit's test would cabin the legal error. The Solicitor General agrees with petitioners that the control test is fundamentally wrong and that federal regulation, no matter how pervasive, cannot be the basis for a private regulated party to avail itself of § 1442(a)(1). *See* SG Br. 12. Thus, Philip Morris's vigorous effort (Supp. Br. 2-7) to rebut the Solicitor General's view of FTC "regulation" ultimately is irrelevant.

Second, even while seeking comfort in the Eighth Circuit's statements that the FTC's regulation of tobacco companies was "unprecedented" and "extraordinary," the Solicitor General contradictorily demonstrates (at 8-11) that the degree of regulation here was in fact minimal. Courts looking beyond the Eighth Circuit's labels will find that numerous industries are subject to regulation that is far more intrusive, coercive, and controlling than what the Eighth Circuit found sufficient to justify removal here. If the decision below is taken seriously, therefore, it will turn a host of regulated entities into federal officers for

purposes of § 1442(a)(1), an outcome that would extend the ruling below far beyond its immediate boundaries.

Third, that no court of appeals has yet endorsed what the Solicitor General believes to be the proper legal standard (*see* SG Br. 19-20) weighs in favor of, not against, this Court's review. Indeed, it is unclear how the Solicitor General expects the courts of appeals to arrive at the proper legal test without this Court's guidance, because the United States will not likely be involved (at the district court or appellate level) in most cases involving private parties with a questionable entitlement to removal.

Fourth, the Solicitor General's wait-and-see approach will undermine the States' substantial interest in remedying deceptive practices aimed at consumers. In letters to the Solicitor General, the Attorneys General of 30 States urged a recommendation that certiorari be granted, warning that "the Eighth Circuit's decision . . . has significant consequences for the States." App., *infra*, 1a. The Attorneys General collectively "file thousands of suits each year attacking pernicious trade practices," and many of those suits involve defendants subject to extensive federal regulation. *Id.* There is "no question," in their view, that regulated entities will invoke the Eighth Circuit's reasoning as a basis for removal. *Id.* at 3a. "A suggestion to wait for another case would be an open invitation . . . to test the waters by removing and litigating over remand motions." *Id.* Even if ultimately successful in obtaining remand to state court, States "would be forced to expend significant and scarce resources," and "meritorious litigation that would have proceeded in state courts will stop while remand motions are litigated." *Id.* at 3a-4a. That result would "hamper[] the deterrent effects of state consumer protection laws." *Id.* at 3a; *see also id.* at 8a ("The mere threat of being able to raise the costs of litigation in this manner may deter necessary state enforcement actions.").

A review of district court proceedings since the decision below substantiates the concern of the Attorneys General.

Private defendants of all types have invoked some version of a control test to support removal, including private insurance companies in an action alleging negligence and breach of duty under state law (*Rizzuto v. Bianchini*, No. Civ. A. 06-6883, 2006 WL 3332832, at *5 (E.D. La. Nov. 14, 2006)); pharmaceutical manufacturers in a case involving state-law claims for wrongful death (*Stanley v. Wyeth Inc.*, No. Civ. A. 06-1979, 2006 WL 2588147, at *2 (E.D. La. Sept. 8, 2006)); railroad companies in a case involving a wrongful death claim based on a train-automobile collision (*Sullivan v. BNSF Ry. Co.*, 447 F. Supp. 2d 1092, 1099 (D. Ariz. 2006)); window-blind manufacturers in a case involving strangulation dangers posed to children (*Alsup*, 435 F. Supp. 2d at 843); automatic implantable cardioverter defibrillator manufacturers in a case involving state-law tort claims (*In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 428 F. Supp. 2d 1014, 1017 (D. Minn. 2006)); a private hospital in an action involving claims of negligence and intentional misconduct (*Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, No. Civ. A. 06-3179, 2006 WL 3396171 (E.D. La. Nov. 21, 2006)); and a mortgage company, lender, and loan servicing company in a case involving claims of fraudulent misrepresentation (*King v. Provident Bank*, 428 F. Supp. 2d 1226, 1231 (M.D. Ala. 2006)).

Although removal was ultimately rejected in some of those cases, at least two district courts relied on the Eighth Circuit's decision in denying motions to remand. *See Kelly v. Martin & Bayley, Inc.*, No. 05-CV-0409-DRH, 2006 WL 44183, at *3-*4 (S.D. Ill. Jan. 9, 2006) (holding, "[b]ased on the reasoning set forth in *Watson*," that federal officer removal by cigarette company was proper); *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196-97 (M.D. Fla. 2006) (denying remand of negligence claims related to an air transportation accident based on "'detail and specificity'" of federal control) (quoting *Watson*). The Solicitor General's hope (at 15-16) that

the Eighth Circuit's error will be contained is, at least so far, unfounded.[6]

Fifth, the Solicitor General's recommendation takes no account of the burden that an increase in removals by private parties testing the boundaries of the Eighth Circuit's test will have on the already overworked federal judiciary. *See* Pet. 26-30. Given the expansive reach of the Eighth Circuit's test and the Solicitor General's acknowledgment that under no circumstances should regulated parties be able to invoke the federal officer removal statute, there is no justification for burdening federal courts with matters that intrinsically belong in state court. *Cf. City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941) (federal diversity statute is strictly construed to "reliev[e] the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts") (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons and those stated in the petition and reply in support of the petition, the petition for a writ of certiorari should be granted.

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[6] Noting that *Kelly* is pending on appeal in the Seventh Circuit, the Solicitor General without explanation says that, "[r]egardless of the disposition of that case," review is not warranted here. SG Br. 15 n.*. We take the opposite view: regardless of which way *Kelly* is decided, plenary review *is* warranted here. If the Seventh Circuit rejects the Eighth Circuit's approach and holds that removal was improper, there would be a square circuit split, but one that might well evade review given the Solicitor General's forceful denunciation of Philip Morris's theory – the tobacco company defendant may be unwilling to risk the industry's Eighth Circuit win by seeking review of a Seventh Circuit loss. If, on the other hand, the Seventh Circuit embraces the Eighth Circuit's approach and upholds removal, the decision will reinforce concerns that the ripple effect of the Eighth Circuit's error will extend to litigation in other circuits. Either way, the prudent course would be to stem the mischief being created by the Eighth Circuit's judgment.

Respectfully submitted,

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December 27, 2006

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Letter from Jeremiah W. (Jay) Nixon, Attorney General of Missouri, *et al.*, to Hon. Paul D. Clement, Solicitor General (Aug. 23, 2006) 1a

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The Honorable Paul D. Clement
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Re: *Watson v. Philip Morris*, No. 05-1284

Dear General Clement,

We have learned that the Supreme Court has invited you to express the views of the United States in *Watson v. Philip Morris*, No. 05-1284. We urge you to recommend that certiorari be granted.

This case raises an issue of concern to the States: whether private regulated entities may invoke the federal officer removal provision of 28 U.S.C. § 1442(a)(1) to remove a state-law case to federal court. In our view, the Eighth Circuit's decision upholding Philip Morris's right to invoke this removal provision has significant consequences for the States.

To understand our interest, it is important to recognize the role of the state attorneys general in business regulation. We are the principal enforcers of state laws banning unfair and deceptive trade practices. Collectively, we file thousands of suits each year attacking pernicious trade practices. The defendants in many of those cases are regulated or influenced in some way by some federal official or agency. Though the extent of federal involvement varies considerably, in many instances it matches, and

sometimes exceeds, the involvement of the Federal Trade Commission with regard to so-called "light" cigarettes.

It is also important to recognize the legitimacy of the preference we have for pursuing such actions in the courts of our states. That preference is not a parochial or political one; it is a recognition of the real impact of being forced out of local courts and into the federal system. Some of those concerns are purely practical; our attorneys, victims, and witnesses may lose the chance to try a case down the block rather than across the state. And federal litigation is generally slower and more costly – and thus more burdensome both on our offices and on the victims of unfair business practices.

But equally important is our concern for the development and consistent application of state law. Federal judges typically do not have the same level of experience with the development of state law as do state court judges. And federal judges may not have the same respect for precedent in state systems. Involvement of the federal courts may interfere with the orderly development of the state law we are constitutionally bound to defend and morally bound to advance. State courts are not bound, in future cases, by the federal courts' interpretations of state law. Thus the prospect of wholesale removals to federal court would adversely affect our ability to plan state enforcement actions and to prosecute them with the knowledge and certainty of how state law will develop.

Of course, every extension of the removal power adds to the workload of the federal courts. Such an addition is necessary where Congress specifically directs that a class of cases be heard in federal court. But Congress has not done so here, and there is no sound reason of policy why a privately regulated party should be permitted to take a state enforcement action to federal court under the federal officer removal provision. The purpose of that provision was to protect federal officers from defending their actions in state court. It was not to give a federal forum

to private parties that are regulated by the federal government.

Our greatest immediate concern is with the cost and delay inherent in the removal/remand process. It is expensive, time consuming, and ultimately unproductive to litigate over the appropriateness of removal. Such litigation can delay a case by many months and involve unnecessary expense and effort. The delays associated with litigation over removals hampers the deterrent effects of state consumer protection laws and creates an incentive for defendants to engage in whatever means they can to slow down the dispute resolution process.

There is no question but that businesses whose practices we address – not just tobacco companies – will respond to that incentive. Although the Eighth Circuit sought to limit the reach of its decision, it is worded broadly. Thus private defendants in a range of other contexts have already invoked that rule to justify removal. *See, e.g., Alsup v. 3-Day Blinds, Inc.*, No. 06-244, 2006 WL 1599842 (S.D. Ill. June 8, 2006) (window-blind manufacturer); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 428 F. Supp. 2d 1014 (D. Minn. 2006) (automatic implantable cardioverter defibrillator manufacturer); *King v. Provident Bank*, 428 F. Supp. 2d 1226 (M.D. Ala. 2006) (mortgage company, lender, loan servicing company).

A recommendation by the Solicitor General that the Court defer deciding the propriety of removals in this context would itself send an unwanted message to these private defendants, at least to those businesses in highly regulated sectors. A suggestion to wait for another case would be an open invitation to corporate defendants in highly regulated sectors to test the waters by removing and litigating over remand motions. For States, that would be highly problematic; we would be forced to expend significant and scarce resources in seeking to remand cases to the state courts where they properly belong. All the while, meritorious litigation that would have

proceeded in state courts will stop while remand motions are litigated.

Accordingly, we urge you to recommend that the Supreme Court grant the petition for a writ certiorari.

Sincerely,

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August 8, 2006

The Honorable Paul D. Clement
Solicitor General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Re: *Watson v. Philip Morris*, No. 05-1284

Dear General Clement:

I am writing in connection with the Supreme Court's order inviting you to express the views of the United States in *Watson v. Philip Morris*, No. 05-1284. I urge you to recommend that certiorari be granted and that the judgment of the Eighth Circuit be reversed.

This case raises a significant issue of great concern for the States: whether private regulated entities may invoke the federal officer removal provision of 28 U.S.C. § 1442(a)(1) to remove a state-law case brought in state court to federal court. In my view, the Eighth Circuit's decision upholding Philip Morris's right to invoke this removal provision is erroneous, and that error has significant potential consequences for other enforcement actions by states.

Many businesses and individuals are subject to some sort of federal regulation; indeed, many agencies have far more extensive regulations of private conduct than the

Federal Trade Commission's policies with respect to so-called "light" cigarettes, the subject of the *Watson* case. Yet the Eighth Circuit held that those policies were sufficiently extensive as to cause Philip Morris to be "acting under" the aegis of federal officers in performing the ordinary commercial function of marketing its products. Notwithstanding some admonitory language in the Eighth Circuit's opinion, it is difficult to see how the rule announced by the Eighth Circuit can be limited to the tobacco context. Indeed, there are private lawsuits involving railroads, medical device manufacturers, lending institutions and others that have already invoked Watson to remove state law cases to federal court on the ground that those industries are also "federal officers."[1]

Such removals are available not just in litigation brought by private plaintiffs, but also in civil enforcement actions brought by state Attorneys General. Thousands of cases are brought each year by state Attorneys General against private entities under state unfair and deceptive trade practices statutes. Such enforcement actions are an important function of state sovereignty. As the Attorneys General of seventeen states informed the Supreme Court in 2004 "[t]he States have a vital interest in preserving their power to regulate traditional areas of states concern, such as the protection of consumers from unfair and deceptive practices."[2] It would be highly disruptive to such state enforcement efforts, and thus contrary to our system of federalism, for state Attorneys General to be forced to

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[1] *See, e.g., Alsup v. 3-Day Blinds, Inc.*, No. 06-244, 2006 WL 1599842 (S.D. Ill. June 8, 2006) (window-blind manufacturer); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 428 F. Supp. 2d 1014 (D. Minn. 2006) (automatic implantable cardioverter defibrillator manufacturer); *King v. Provident Bank*, 428 F. Supp. 2d 1226 (M.D. Ala. 2006) (mortgage company, lender, loan servicing company).

[2] Brief of the States of Texas, Alabama, California, Connecticut, Illinois, Iowa, Massachusetts, Minnesota, Missouri, Montana, New York, Ohio, Oklahoma, Utah, Vermont, Virginia, and Washington, as *Amicus Curiae* in Support of Petitioners, *Bates v. Dow Agrosciences, LLC*, No. 03-388 (Sept. 13, 2004).

enforce state laws against private entities in federal courts. That outcome is particularly troubling in light of the Federal Trade Commission's and Congress's efforts to promote viable state deceptive practices actions to supplement federal enforcement efforts.

In addition to being contrary to basic notions of federalism, such a permissive view of federal removal authority would create greater uncertainty in state enforcement efforts because of the relative difficulty of predicting how federal courts will interpret state laws, particularly when the state's highest court has not spoken directly to the question in issue.

Even in those situations in which the federal court would not apply the *Watson* rule, states would still be forced to expend resources to litigate unnecessarily over whether such cases should be remanded. The mere threat of being able to raise the costs of litigation in this manner may deter necessary state enforcement actions. Defendants would assert that *Watson* gives them a good-faith basis for removal, so courts would likely be reluctant to impose costs against such defendants for meritless removals.

For these reasons, I urge you to recommend that certiorari be granted now, before those developments cause significant disruptions to state enforcement efforts. Thank you for your consideration.

Very truly yours,

/s/ PEGGY A. LAUTENSCHLAGER

Peggy A. Lautenschlager
Attorney General